No. 6997.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Fallon E. Kirk,
Claimant and Appellant,

vs.

United States of America,
Libelant and Appellee,

American Gas Screw V-293, Her Motors, Tackle, Apparel, Furniture, etc., and Eric Hogstrom,
Respondent.

REPLY BRIEF OF APPELLEE.

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TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

AUTHORITIES.

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STATEMENT OF FACTS.

The brief for appellant contains a preliminary statement, together with a statement of facts, and essentially the facts contained therein are correct. However, certain conclusions have been drawn in the statements which assume the very issues presented to this court and obviously we are unable to agree with these conclusions.

At page 1 of the brief for appellant the statement is made that the Respondent Vessel is an *undocumented vessel.* The question concerning the documentation of

this vessel is for this court to decide and we shall cite authorities supporting the contention of the appellee that the number, V-293, awarded to the Respondent Vessel constitutes a document.

On page 2 of the brief for appellant under the heading "Questions at Issue," paragraph two thereof, the assumption, in stating the second question at issue, that the Respondent Vessel was engaged in transporting goods gratuitously is not concurred in by the appellees.

At page 5 of the brief for appellant, in the latter part of the third paragraph, the statement is made "and no navigation rule or regulation was being violated;". In our opinion this is the very question at issue in this appeal and the mere statement of such a conclusion amounts to nothing more than an opinion on the part of the appellant.

And again on page 6 of the brief, paragraph one, the conclusion is drawn that no similarity exists between Government's Exhibit No. 1 (for identification) and Respondent's Exhibit "C." This conclusion may or may not be supported by reference to the exhibits. The further statement that the last mentioned conclusion is supported by the Government's witness is best evidenced by reference to page 27 of the transcript of record.

In brief the facts are as follows:

Commander Muller S. Hay received, in the ordinary course of government business, Government's Exhibit No. 1 for identification from his superior officer located in San Francisco. As the exhibit shows, a request by

radio was intercepted wherein certain supplies were requested to be delivered to the *"Algie,"* a British rum vessel, by some shore boat. Shortly after intercepting this message, United States Coast Guard Patrol Boat No. 257 overhauled the Respondent Vessel, *American Gas Screw V-293,* standing out of Los Angeles' outer harbor toward the north end of Catalina Island. The Respondent Vessel was a typical rum boat, painted a battleship gray and equipped with a 300 horse power Liberty motor.

Prior to the date of seizure, to-wit: March 3, 1932, she had been overhauled under suspicious circumstances and the odor of liquor had been noted by the boarding officer. When seized on March 3rd she had aboard a large quantity of supplies and foodstuffs, totalling about 1200 pounds. The total amount of supplies was about one-third of those called for on the list to be delivered to the *"Algie."* At the time of boarding the Respondent Vessel the explanation given by the master, Mr. Eric Hogstrom, concerning his destination and the amount of cargo aboard his vessel did not satisfy the Coast Guard's man and the vessel was seized and returned to the coast guard base.

Thereafter a libel was filed and the vessel was seized by the United States marshal for disposition pursuant to the further order of the court. The court determined that the vessel had become subject to forfeiture and its final decree of condemnation, forfeiture and order of disposition was entered on May 10, 1932, by the clerk.

ERRORS ASSIGNED BY APPELLANT.

ASSIGNMENT No. I:

This assignment has not been supported by argument or authorities in the appellant's brief and is dependent upon the final decision of the lower court in deciding the issues of the case.

ASSIGNMENT No. II:

This assignment is dependent upon the question of fact decided by the trial court in favor of the appellee and any error by the court in making its decision must be predicated upon all the facts in the case.

ASSIGNMENT No. III:

The claimant, Eric Hogstrom, is not a party to this appeal and the answer referred to in this assignment is not a part of the record, hence this assignment should be disregarded.

ASSIGNMENT No. IV:

Reference to page 9 of the transcript discloses that paragraph I of the answer of the appellant and owner of the vessel admits the allegations contained in paragraphs I and II of the libel. Thus any error based upon this admission becomes unintelligible and should be disregarded for that reason.

If Assignment No. IV refers to the affirmative defense set up by the appellant and owner of the vessel, then it too should be disregarded for the reason that a defense

based upon innocence or lack of knowledge on the part of an owner under the facts of the case at bar is not tenable.

Goldsmith-Grant Co. v. United States, 254 U. S. 505;

The Pilot (C. C. A. N. C. 1930), 43 F. (2d), 491;

The Mineola (C. C. A. Mass. 1927), 16 F (2d), 844;

The Esther M. Rendle (C. C. A. Mass. 1925), 7 F (2d) 545.

ASSIGNMENT No. V:

This assignment states the contents of Assignment No. XX and adds no new grounds upon which to base error other than that contained in Assignment No. XX. The argument of the appellee pertaining to this assignment will be covered in the argument pertaining to Assignment No. XX.

ASSIGNMENT No. VI:

Reference to paragraph III of the findings of fact will disclose that there was no finding that the Respondent Vessel was documented *solely* for fishing. The appellant cites no authorities to support his contention contained in this assignment that the Respondent Vessel could engage in other occupations than that named as its principal occupation.

Contrary to the contention contained in this assignment is the recent decision from the United States Supreme Court in the case of *United States v. The Ruth Mildred,* 286 U. S. 67.

In this case Mr. Justice Cardozo states, at page 69:

> "The 'Ruth Mildred' was licensed for the fishing trade and not for any other. She would have been subject to forfeiture if her cargo had been wheat or silk or sugar. In a suit under this statute, her guilt was not affected, was neither enlarged nor diminished, by the fact that the cargo happened to be one of intoxicating liquors. The Government made out a case of forfeiture when there was proof that the cargo was something other than fish."

ASSIGNMENT No. VII:

This assignment adds nothing to Assignments No. V and No. XX.

ASSIGNMENT No. VIII:

This assignment is controlled by the authorities cited in opposition to Assignment No. IV, *supra.*

ASSIGNMENT No. IX:

As will appear from the statement of this assignment, Government's Exhibit No. 1 was admitted *for identification* [Tr. 22]. The exhibit was never received in evidence for the reason that the court deemed the exhibit to be unnecessary and immaterial [Tr. 69].

At this time an exception was taken on the part of appellee to the court's ruling and, though no cross-appeal has been filed by the appellee in this matter, we respectfully urge that the said exhibit should have been received in evidence for the reasons set forth at the time of trial [Tr. 68-69].

Assignments Nos. X, XI, XII and XIII:

We invite the court's attention to Rule II of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit:

> "* * * When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Most of the testimony referred to in the above numbered assignments was not objected to at the time of trial nor was an exception taken by the appellant. The testimony to which an exception was taken is not set out in the assignment of errors as provided by Rule 11 and the rule further provides that when this is not done counsel will not be heard, except at the request of the court.

However, the testimony referred to is admissible for the purposes of showing probable cause for the institution of the Libel of Information.

The witness Lundberg testified that on February 28, 1932, four days prior to the seizure of the vessel, he caused her to be boarded and at that time he saw a well known rumrunner aboard the vessel and upon leaning into the pilot house of the Respondent Vessel he detected an odor of liquor. At that time the vessel was standing in the Los Angeles Harbor from seaward. The circumstances surrounding this boarding caused the Coast Guard's man to be suspicious of this vessel and this suspicion was a ground for probable cause for any subsequent boarding [Tr. 44-49].

The testimony of Lieutenant Fletcher was in further support of probable cause for the institution of the libel

proceedings in that his testimony disclosed a discrepancy in the statements of the master and the member of his crew, H. L. Johnstone, concerning the destination of the Respondent Vessel at the time of seizure.

According to the testimony of this witness the master, Eric Hogstrom, stated that he was bound for Santa Cruz Island. The witness further testified that Mr. Larsen, also known as H. L. Johnstone and referred to above, stated that they were going "to an island" [Tr. 50-51].

This witness testified that certain figures on a chart taken from the vessel indicated that the course of the vessel would bring it northwest off of Catalina Island. Such a course would be approximately 70° off the course for Santa Cruz Island [Tr. 62-63].

This witness further testified that no fishing gear was found aboard the vessel nor were any guns or ammunition found which might be used to hunt on the island as contended for by the appellant [Tr. 52].

This witness gave expert testimony respecting the construction of the vessel and his conclusion was that he had never seen a vessel of this type engaged in commercial fishing [Tr. 58].

The testimony of the witness Noland was material for the purpose of showing a probable contact by the Respondent Vessel with the British rum boat *"Algie."* This witness testified that on March 1st, two days prior to the seizure of the Respondent Vessel, he saw the *"Algie"* alongside a known rum ship taking aboard a cargo of intoxicating liquors [Tr. 65-67].

His testimony further disclosed that the *"Algie"* could make the run from its position 150 miles southeast of

San Clemente to that island in about 15 hours. From this testimony, and from the list of supplies contained in Government's Exhibit No. 1 for identification, the conclusion may be drawn that the *"Algie"* was to contact the *V-293* about March 3, 1932, for the purpose of taking on the supplies aboard the *V-293* and possibly transferring a cargo of liquor to the speedboat.

We make this observation not for the purpose of contending that these conclusions were proved by the evidence but for the purpose of supporting the suspicions of the Coast Guard's men when they boarded the Respondent Vessel on March 3rd. Such suspicions are sufficient to give the Coast Guard's men reasonable or probable cause for seizing the Respondent Vessel and they are further grounds to show probable cause for the institution of the action at bar.

> "* * * 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."
>
> *Locke v. United States,* 11 U. S. 337 at 347;
>
> *The Thompson,* 70 U. S. 155 at 162.

> "* * * Probable cause must, in this connection, mean reasonable ground of presumption, that the charge is, or may be, well founded;
>
> * * * * * * * * *
>
> "* * * The 71st section of the Act of 1799 declares, that, 'in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in

every such case, the *onus probandi* shall lie upon such claimant;' and it is afterwards added, 'but the *onus probandi* shall lie on the claimant, only where probable cause is shown for the prosecution, *to be judged of by the court before whom the prosecution is had.*" (Last thirteen words in italics ours.)

Wood v. United States, 41 U. S. 341 at 366.

The above quotations were taken from the opinion of Mr. Justice Story wherein certain cloth was forfeited for violation of the Customs Laws.

Section 615 of the Tariff Act of 1930 provides as follows:

"Burden of Proof in Forfeiture Proceedings. In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. (June 17, 1930, c. 497, Title IV, § 615, 46 Stat. 757.)"

19 U. S. C. A. 1615.

The procedure provided for in the above quoted section has been held to apply to violations of the navigation laws

and particularly to section 4377 R. S., 46 U. S. C. A. 325, now under consideration.

The Chiquita, 41 F. (2d) 842; affirmed in 44 F. (2d) 302 (C. C. A. 9);

United States v. Davidson, 50 F. (2d) 517 at 521 (C. C. A. 1);

Jackman v. United States, 56 F. (2d) 358 at 360 (C. C. A. 1).

It is our contention, therefore, that if probable cause for the institution of the Libel of Information, to be judged of by the court, is shown then the burden of proving that no violation was committed shifts to the claimant.

It is our further contention that the decision by the trial court respecting the showing of probable cause is conclusive unless on appeal it is shown that the trial court made its finding without any substantial evidence to support that finding. It should be noted in this appeal that the question of probable cause, as found by the trial court, has not been raised.

That the decision of the court is final in this regard is supported by the following:

> "* * * The question, whether there was probable or reasonable cause for the seizure, constituted no part of the issue to be tried by the jury. So far as it respected throwing the *onus probandi* upon the claimants, it was a matter solely for the consideration of the court in the progress of the trial, and collateral to the main inquiry, although of great importance in regulating the nature and extent and sufficiency of the evidence."
>
> *Taylor, et al. v. United States,* 44 U. S. 197 at 206.

And the court further says, at page 211:

> "The main exception however to the charge is as to the ruling of the judge that there was probable cause of seizure, and that, therefore, the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge, in his views of the evidence as applicable to this point. He, and not the jury, was to judge whether there was probable cause or not to throw the *onus probandi* on the claimants; for the 71st section of the act of 1799, chap. 128, expressly declares that 'the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom such prosecution is to be had.'"

Buckley v. United States, 45 U. S. 250 at 259 following *Taylor v. United States,* (*supra*).

In the following case certain lots of feathers were imported. The feathers contained in lots one and two were imported contrary to law. The feathers contained in lots one and two were forfeited to the government and the feathers contained in lot three were given to the claimant. Both parties appealed and the question of probable cause is discussed by the Circuit Court. This question arose under a statute similar to section 615 of the Tariff Act of 1930, and the court said:

> "* * * If there was probable cause for the seizure, the burden of proving the legality of importation was upon the claimant, who was possessed of the goods. If, in the opinion of the court, at the end of the government's proof, there was not enough evi-

dence to go to the jury, then there was not such probable cause as to put the burden of proof upon the claimant." (Page 303.)

The court further states, at page 304 respecting the finality of the trial court's decision as to probable cause, as follows:

> "We have no expression of the district judge as to what evidence persuaded him to the conclusions he arrived at, but we shall assume he applied the rule of evidence above referred to. No exception to any ruling of the district judge in this record squarely presents the question argued by the libelant as to the shifting of the requirement or burden of proof to the claimant. We believe the district judge to whom the facts were presented may well have found a want of probable cause after considering the libelant's proofs, and thus not required the claimant to offer evidence or explanation to show his legitimate possession. The finding of the district judge is as conclusive upon us as would be the verdict of the jury, were the question decided by a jury in the case."
>
> *U. S. v. One Bag of Paradise, etc., Feathers,* 256 Fed. 301.

ASSIGNMENT No. XIV:

This assignment in effect charges misconduct on the part of the Assistant United States Attorney presenting the case at the trial. Again it should be noted that no specific charge is made, pursuant to Rule 11 of the Rules of this court, nor is the charge supported by anything stated in the brief of the appellant.

ASSIGNMENTS Nos. XV, XVI, XVII, XVIII, XIX, XXI, XXII and XXIII:

The assignments numbered above pertain entirely to the weight of the evidence as disclosed at the trial. When the burden of proof shifts, as heretofore set forth, the claimant is required to go forward with the proof of showing that he was innocent of any wrongdoing pertaining to the violation set forth in the Libel of Information. If he fails in this proof then the decision of the court must go against him as it did in the case at bar.

In the final analysis of the evidence upon which the above numbered assignments are based, the contention of the appellant is that the court should have believed the appellant and his witnesses and should have disbelieved the witnesses who testified for the Government.

> "* * * When questions of fact are dependent upon conflicting evidence, the decision of the trial judge, who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility, will not be reversed unless it clearly appears that the decision is against the evidence." Manual of Federal Appellate Procedure by Paul P. O'Brien, page 206.

The Alijandro (C. C. A. 9), 56 F. 621, 624;

The Hardy (C. C. A. 9), 229 F. 985;

Sorenson v. Alaska S. S. Co. (C. C. A. 9), 247 F. 294;

The Beaver (C. C. A. 9), 253 F. 312;

The Mazatlan (C. C. A. 9), 287 F. 873;

The West Keats (C. C. A. 9), 20 F. (2d) 508;

Siciliano v. California Sea Products Co., 44 F. (2d) 784 (C. C. A. 9).

Respecting the weight of the evidence we have these few observations to make which are in addition to the conclusions of the trial court who listened to the witnesses, saw their manner of testifying, and drew its conclusions as to the truth or falsity of their testimony.

At page 85 of the transcript the appellant testified that he had fished while on the Respondent Vessel around vacation time in the summer of 1931. At page 97 of the transcript the appellant testified that the machinery wasn't put into the vessel so that it would work until October, 1931. At page 4 of the appellant's brief the statement is made that the vessel was not commissioned until October of 1931. Obviously October is not in the summer of 1931 and it is difficult to reconcile the two statements of the appellant.

The testimony of this witness further disclosed [Tr. 96] that the building of the vessel was started in March of 1931 and that it was completed in October of 1931. He stated that the vessel was built primarily for fishing [Tr. 74] and that his purpose in building it was to make money [Tr. 79]. He invested approximately $4,500.00 in the vessel [Tr. 74] and chartered the vessel to Eric Hogstrom for $300.00 per month [Tr. 79]. He saw Hogstrom twice from October, 1931, until February, 1932 [Tr. 86], and received no money whatsoever in payment for the use of the vessel during this period of time [Tr. 87].

This type of testimony standing alone, and without seeing the witness testify and thus noting his manner of testifying, is sufficient to warrant its disbelief.

The decision of the court discloses that this testimony, together with the testimony of Eric Hogstrom was not believed by the court. The observations of the court, contained at page 141 and 142 of the transcript, reflect its opinion regarding the defense.

ASSIGNMENT No. XX:

The alleged error complained of in this assignment is the same error as that complained of in Assignment No. V and our argument is intended to cover both assignments.

The statute upon which the forfeiture was declared is set forth on page 3 of the brief for appellant as section 4377 R. S. (46 U. S. C. A. 325). The appellant has not cited any authorities to support his contention that the provisions of the above named statute are not applicable to a vessel operating under a number issued by the Collector of Customs pursuant to the Act of Congress of June 7, 1918, c. 93, sections 1, 2, 3, 4, 5; 40 Stat. 602; (46 U. S. C. A. 288).

The only authority cited by the appellant, viz. *The F. H. Russell,* 30 F. (2d) 286, is an authority in favor of the contentions of the appellee. Forfeiture in the last mentioned case was decreed under section 4189 R. S. (46 U. S. C. A. 60), but the court held that the number allotted to a vessel is to be considered a record or document granted in lieu of a certificate of registry, enrollment, or license. Such a numbered vessel is not authorized to be employed in trade, foreign or coasting.

Respecting the meaning of the word trade the following statement is enlightening:

> "* * * The unexplained fact that a vessel licensed to be employed in the coasting trade was at

sea, with a cargo of merchandise aboard, is enough to show that she was employed in trade."

Le Bouef et al. v. United States, 30 F. (2d) 394.

The following recent decisions have all decreed a forfeiture of the respondent vessels for violation of their licenses and in each case it will be noted that the vessel was a numbered vessel:

Ford v. Kline (V-2793), 42 F. (2d) 558;
The K-3696, 36 F. (2d) 430;
The K-5691, 50 F. (2d) 180;
The K-1231, 54 F. (2d) 502.

In the case of *Ford v. Kline* it should be noted that the vessel was a motor boat authorized to be used and enjoyed for livelihood purposes only within the jurisdiction of the United States. This case cited *The F. H. Russell, supra,* and held, at page 559, that the number allotted to the vessel is to be considered a record or document granted in lieu of a certificate of registry, enrollment or license.

In the case of *The K-3696* the vessel was licensed as a party and work boat.

In *The K-5961* the principal occupation of the vessel, which appeared upon the registration certificate, was given as "pleasure."

In *The K-1231* the certificate of registration stated that the principal occupation of the vessel was for pleasure and forfeiture was decreed for a violation of the license.

The last mentioned case was approved in the case of *United States v. The Ruth Mildred,* 286 U. S. 67, and the question of trading was further settled in the last

mentioned case when it was held that the presence of a cargo aboard the vessel other than fish would be grounds for forfeiture.

From these cases it appears to be conclusive that section 4377, R. S., applies to a vessel operating with a number as well as to a licensed vessel. We have been unable to find any authority holding to the contrary. It should be noted that section 325 and section 288 of Title 46, U. S. C., are in chapter 12 of the code entitled: "REGULATION OF VESSELS IN DOMESTIC COMMERCE."

Hence it is the logical conclusion that the penalties prescribed in section 325 are applicable to all vessels included within chapter 12. Any exceptions to the penalties as set forth in section 325 are set out in chapter 12. Section 336 of Title 46, U. S. C., excepts canal boats or boats employed on the internal waters or canals of any state from the penalties of section 325. Section 335 of Title 46 excepts lighters or a boat not masted from the provisions of chapter 12. In view of these specific exceptions it appears that if it had been the intention of Congress to except small boats, operating with a number obtained from the collector of customs, such exception would appear in the chapter.

A brief reference may be made to the authorities cited by the appellant at page 13 of his brief.

We have carefully scrutinized the case of the *United States v. The Paryntha Davis,* Fed. Case No. 16003, and we have been unable to find the language quoted in the brief.

The cases of *The Swallow* and *The Willie G* refer to a transportation as a gratuitous act and are not material in deciding the issues in this case in view of the finding of the trial court that the transportation of the foodstuffs involved herein was an act of trading.

In that regard we invite the court's attention to the following decisions wherein it is held that a single act of trading is sufficient upon which to decree a forfeiture of the vessel for the violation of its license:

The sloop *Active,* a vessel licensed for the fishing trade, was laden, in the night of July 4, 1808, in the port of New London, and was seized by the revenue officer, after having left the wharf, without a clearance, under circumstances which justified a belief that she was about to proceed on a foreign voyage. The charges were a violation of the acts laying an embargo and a violation of the vessel's license.

The vessel was held to be forfeited for the violation of her license.

The Active, 11 U. S. 99, at 105.

In deciding the following case Judge Fox, of the District Court of Maine, held that a single act of trading was sufficient to cause a forfeiture for the violation of the license. At page 528 he states the following:

> "In the various cases which have been before the district and circuit courts for a violation of this provision, it has been uniformly held that a single act of trading not authorized by a license would subject the vessel to forfeiture. It is claimed in defence, that the trade or employment for which the vessel is licensed must be abandoned, and that for the time

being she must be exclusively employed in the unauthorized trade, in order to subject her to forfeiture. Such a construction does not meet with the approval of the court. If adopted it would eventually annul and defeat this provision of the act. If it is sanctioned, a vessel licensed for the fisheries might pursue in part that employment, and as occasion offered in the course of her fishing voyages engage in smuggling operations, and thus the mischief would prosper which the law intended to punish. A vessel in the course of her voyage may pursue two employments, one legal, the other unauthorized, and be subject to the penalties of the law for the consequences of her illegal employment."

The Ocean Bride, Federal Case No. 10,404, 18 Federal Cases 526, at 528-9.

The following cases are in support of those cited above respecting this point:

The Two Friends, Federal Case No. 14,289, 24 Federal Cases 433, at 434;

United States v. The Paryntha Davis, Federal Case No. 16,004, 27 Federal Cases 456. at 457.

The suggestion has been made by the appellant that incompetent and prejudicial evidence was admitted at the time of the trial. We submit that assuming the contention of the appellant to be correct, which we do not admit as a matter of fact, the authorities are unanimous in holding that the reception of inadmissible evidence is not reversible error where there is competent evidence otherwise to sustain the conclusions of the sitting justice.

Alksne v. United States, 39 F. (2d) 62, at 69.

Of course, the reason for this ruling is that the Court of Admiralty sits without a jury and evidence which might prejudice a jury should not affect the sitting justice.

At page 15 of his brief the appellant contends that numbered vessels were intended by Congress to engage in several ventures essential to justification of investment. In other words the appellant contends that numbered vessels were intended to engage in various kinds of commerce and trade, including the business of fishing. Such a construction has not been given by the courts to this statute and *The F. H. Russell, supra,* holds squarely that a numbered vessel shall engage in no trade. In our opinion this case is conclusive of the appellant's argument in that regard.

CONCLUSION.

We submit that the ultimate facts to be concluded from all the testimony, as set forth in the transcript, together with the law applicable to these facts, as construed by the courts, support the forfeiture of the Respondent Vessel as decreed by the District Court and that no reversible error appears in the record.

Respectfully submitted,

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